

June 9, 1999

MEMORANDUM TO: Chairman Jackson
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield

FROM: Karen D. Cyr /s/
General Counsel

SUBJECT: THE NUCLEAR REGULATORY COMMISSION'S PROCESS FOR
ADOPTING THE DEPARTMENT OF ENERGY'S
ENVIRONMENTAL IMPACT STATEMENT FOR THE GEOLOGIC
REPOSITORY

The purpose of this memorandum is to describe the Nuclear Regulatory Commission's (NRC's) involvement in the Department of Energy's (DOE's) preparation of an environmental impact statement (EIS) for the geologic repository and to describe how the NRC plans to adopt DOE's EIS and use it in NRC's licensing proceeding for a construction authorization for the repository. This is provided in response to the Commission's request, in its April 12, 1999 Staff Requirements Memorandum on "Briefing on Status of DOE High Level Waste Viability Assessment", for information on the NRC's role as a commenting agency on the DOE's EIS, the process to be used in the event the EIS requires additional supplementation to satisfy NRC licensing requirements, and the possibility of the NRC's accepting views from other stakeholders for consideration in formulating formal comments to DOE on its EIS.

- I. The Mandates of the Nuclear Waste Policy Act Affecting NRC's Duties Under the National Environmental Policy Act
- A. Statutory Provisions

The Nuclear Waste Policy Act of 1982, as amended (NWPAA), 42 U.S.C. 10101 et seq., specifies that a recommendation made by the Secretary of Energy to the President to approve the Yucca Mountain site for the development of a geologic repository shall be considered a major Federal action significantly affecting the quality of the human environment for purposes of the National Environmental Policy Act of 1969 (NEPA) which will require preparation of an EIS. Section 114(f). The EIS is to accompany the Secretary's recommendation to the President. The NWPAA further specifies that the NRC is to adopt DOE's EIS:

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Any environmental impact statement prepared in connection with a repository proposed to be constructed by the Secretary under this subtitle shall, to the extent practicable, be adopted by the Commission in connection with the issuance by the Commission of a construction authorization and license for such repository. To the extent such statement is adopted by the Commission, such adoption shall be deemed to also satisfy the responsibilities of the Commission under [NEPA] and no further consideration shall be required, except that nothing in this subsection shall affect any independent responsibilities of the Commission to protect the public health under the Atomic Energy Act of 1954 (42 U.S.C. 5841 et seq.).

Section 114(f)(4).¹

B. The Commission's 1989 Rulemaking

In 1989, the Commission issued a final rule setting forth its procedures for implementing NEPA with respect to a geologic repository and setting the standards it would use in determining whether adoption of DOE's EIS is "practicable" within the meaning of section 114(f)(4) of the NWPA. 54 Fed. Reg. 27864 (July 3, 1989). To the extent that it is practicable to adopt, section 114(f) directs that "no further consideration" of environmental issues by the Commission is required. The final rule was based on a detailed analysis of the legislative history of the NWPA presented in the proposed rule (53 Fed. Reg. 16131, May 5, 1988) and the comments received on the proposed rule. The Commission viewed the NWPA as intending to have most environmental issues resolved in advance of NRC's licensing decisions. This view stemmed from the structure of the NWPA which provides for Congressional review of the EIS and other documents supporting DOE's site recommendation in the context of a State or Tribal Notice of Disapproval under section 115 and for judicial review under section 119(a)(1)(D). In particular, a petition for judicial review of the adequacy of the EIS must be sought, if at all, within 180 days after the Secretary has made a site recommendation to the President (section 119(c)). If the EIS prepared by DOE has been considered by Congress and perhaps even adjudged to be adequate for purposes of the site recommendation, then further litigation of the issues in NRC adjudications ought to be precluded. The Commission also reasoned that the deadline for commencing action set out in section 119 operates to bar a challenge at a later date in NRC licensing proceedings.

¹Under the NWPA, after the Secretary of Energy makes the recommendation to the President, the President has an opportunity to approve the recommendation. If it is approved, the President submits it to the Congress. Section 114(a)(2)(A). A State in which the site is located or an Indian tribe on whose reservation the site is located may then petition the Congress to disapprove the site. Section 115(b). The Congress is then to consider such petitions and the site shall be disapproved unless the Congress passes a resolution of repository siting approval which then becomes law. Section 115(c). Only after the site designation is permitted to take effect may the Secretary of Energy submit an application to the NRC for a construction authorization for a repository. Section 114(b).

II. How NRC Proposes to Fulfill its NEPA Duties with respect to a Construction Authorization and License for the Repository

A. NRC's role as a commenting agency on the DOE's draft EIS

It is the Commission's policy to comment on draft EISs prepared by other Federal agencies, consistent with the provisions of 40 CFR 1503.2 and 1503.3. 10 CFR 51.124. These Council on Environmental Quality (CEQ) regulations require, in part, that Federal agencies with special expertise with respect to any environmental impact involved comment, with as much specificity as possible, on statements within their expertise or authority.² 10 CFR 51.124. The Commission explicitly stated, in the notice for the proposed rule, that it intended to follow this policy with respect to DOE's draft EIS for the repository and, further, if it had objections to DOE's proposal on the ground of environmental impacts, it would specify the mitigation measures thought necessary to resolve such objections.³ 53 Fed. Reg. 16143. The Commission also stated that "NRC will comment on environmental issues even though those issues may be precluded from litigation in the licensing proceedings." Id. The Commission reasoned that if a court were to find DOE's EIS, or its proposed mitigation measures, inadequate in the course of judicial review, it would then not be practicable for the Commission to adopt the EIS and, in the absence of suitable revisions or supplementation, the Commission could not issue a construction authorization or license. To avoid this eventuality, the Commission would strive, through its comments on the draft EIS, to

²40 CFR 1503.2 provides, in relevant part:

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority.

40 CFR 1503.3 provides, in relevant part:

(a) Comments on an environmental impact statement or on a proposed action shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.

(b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology which it prefers and why.

....

³The Commission considered in the proposed rule whether its involvement in DOE's preparation of the EIS should be that of a "cooperating agency", as described in 40 CFR 1501.6 of the CEQ regulations (a "cooperating agency", among other things, assumes, on request of the lead agency, responsibility for developing information and preparing environmental analyses including portions of the EIS concerning which the cooperating agency has special expertise) but determined that "[i]t would be far more faithful to the statutory scheme for this agency merely to provide its comments from time to time, with respect to environmental impacts falling within its jurisdiction or areas of special expertise." 53 Fed. Reg. 16137.

ensure that the final EIS would be capable of surviving a court challenge. Id.⁴ Thus, the Commission's statements suggest that while the focus of NRC's comments on the draft EIS would be on matters within its special expertise, NRC would feel free to comment on any issues that it believed might jeopardize the EIS on judicial review.

NRC's accepting views of others in its comments on DOE's draft EIS

Neither the draft nor the final rule addressed the possibility of the NRC accepting views from other stakeholders for consideration in formulating formal comments to DOE on the draft EIS. This would be an unusual step to add to NRC's process for formulating its comments because the other stakeholders can, and indeed should, provide their comments directly to DOE pursuant to the normal NEPA EIS process. Nevertheless, we do not see a legal constraint on the staff's ability to consider the comments of other stakeholders in formulating its own if the Commission wishes to introduce this approach in this specific case. However, some problems could arise if this is done. First, there are practical timing questions to consider. NRC's comments (along with everyone else's) will be due by a date certain and NRC would need to know the comments of others well in advance of this date if such comments are to be considered and factored into NRC's comments to DOE.⁵ Moreover, in fairness, comments from all interested members of the public, not just particular stakeholders, would need to be accepted and considered. This could make it exceedingly difficult for the staff to both formulate its own comments and consider outside comments in the limited time available for an agency to develop its comments. Third, care would need to be exercised to ensure that the NRC does not raise expectations in stakeholders that NRC will adopt every stakeholder comment or will address and justify not adopting those comments. Finally, this process could lead some interested members of the public to conclude that this is NRC's EIS rather than DOE's (or perhaps that NRC had acted as a cooperating agency and had itself authored sections of the draft EIS). Some of these problems might be avoided if staff were to conduct a public meeting or workshop in lieu of receiving written comments.

⁴The Commission also observed that, in principle, DOE could reject comments on grounds that might be unsatisfactory to the Commission. If this were to happen, the Commission viewed other forums as the appropriate places to resolve the matter:

[T]he Commission's comments will be a matter of public record and will be available for consideration during judicial and Congressional review of DOE's EIS and related actions. The Commission regards these forums, rather than the NRC usual review, to be the appropriate place, under NWPA, for review of DOE's responses to comments as well as other matters related to the EIS.

53 Fed. Reg. 16143

⁵The NRC would need to find a method to give notice to stakeholders that they can submit comments to the NRC for consideration in NRC's formulation of its own comments.

B. The role of NRC's comments on DOE's EIS in the approval of DOE's site recommendation.

Under section 114(a)(1)(D) of the NHPA, the Secretary of Energy must submit to the President, when making a site recommendation for a repository, a number of documents, including the comments made by the Commission on DOE's draft EIS. The NHPA also provides an opportunity for Congress to request comments from the Commission with respect to any notice of disapproval filed by an affected State or Indian tribe. Section 115(g).⁶ Such comments could include comments concerning DOE's final EIS and might well be expected to include information concerning any lack of responsiveness, on the part of DOE, to the comments submitted on the draft EIS.

C. NRC's standard for determining whether it is practicable to adopt DOE's EIS

The fundamental purpose of NRC's 1989 rulemaking was to provide a standard for implementing the mandate, in section 114(f) of NHPA, that NRC adopt DOE's EIS "to the extent practicable." The standard selected in that rulemaking appears at 10 CFR 51.109(c):

- (c) The presiding officer will find that it is practicable to adopt any [EIS] prepared by the Secretary of Energy in connection with a geologic repository proposed to be constructed under Title I of the [NHPA] unless:
 - (1)(i) The action proposed to be taken by the Commission differs from the action proposed in the license application submitted by the Secretary of Energy; and
 - (ii) The difference may significantly affect the quality of the human environment; or
 - (2) Significant and substantial new information or new considerations render such [EIS] inadequate.

Under this standard, the presiding officer of the licensing hearing will find that it is practicable to adopt any EIS prepared by DOE unless one of two possible deficiencies in the EIS is found.⁷

The first possible deficiency would occur if there is a difference between the action proposed in DOE's license application and the action proposed to be taken by the Commission where this difference might significantly affect the quality of the human environment. This situation could arise if the Commission were to impose license conditions requiring DOE to take actions substantially different from those which DOE had proposed and such different actions significantly affect the environment and were not assessed in DOE's EIS. The Commission expressed the

⁶The statute specifies that "[t]he provision of such comments by the Commission shall not be construed as binding the Commission with respect to any licensing or authorization action concerning the repository involved." Section 115(g).

⁷Thus, adoption of DOE's EIS, in the view of the Commission, does not entail an independent analysis of the adequacy of the EIS on the part of the NRC if NRC's standard for adoption is met. See 53 Fed. Reg. 16138. This is different from adoption under CEQ regulations (40 CFR 1506.3) because Congress, in the NHPA, intentionally restricted NRC's normal NEPA duties with a different process in which the adequacy of the EIS is to be determined by the Congress and possibly the courts outside of NRC's licensing process.

view, in the proposed rule, that it did not anticipate imposition of license conditions with significant environmental impacts because it believes that if significant changes from DOE's original proposal are needed, DOE should amend its license application and supplement its EIS. 53 FR 16142. Only if DOE failed to do this would NRC be faced with the choice of denying DOE's license application or preparing its own supplemental EIS to consider any license conditions thought necessary.

The second possible deficiency would occur if "significant and substantial new information or new considerations" rendered DOE's EIS inadequate. However, the Commission noted that if there are significant new circumstances or new information relevant to environmental concerns, DOE would be obliged to prepare a supplemental EIS (10 CFR 60.24(c); see also proposed 10 CFR 63.24(c)) that would be subject to NRC's adoption under the same standard as the original document and that "[t]he Commission fully expects that supplementation of the EIS by DOE will resolve any new circumstances or information that might arise, and that supplementation by the NRC will not be necessary." 53 FR 16142.

Nevertheless, the Commission recognized that there could be extreme situations when the NRC would need to prepare a supplemental EIS; for example, if the NRC were to identify new information as being significant even though not treated as significant by DOE. Further, the Commission committed to review statements in DOE's EIS relating to radiological concerns to determine if any such statements are inconsistent with the facts found by the NRC on the basis of the record of the licensing proceeding. The Commission will then determine whether the facts found in the hearing constitute "significant and substantial new information or new considerations" which would require preparation of a supplemental EIS. However, it appears rather unlikely that NRC will have to prepare a supplemental EIS.

D. Adoption of DOE's EIS in NRC's licensing proceeding.

In the licensing proceeding for the geologic repository, "the NRC staff shall, upon the publication of the notice of hearing in the Federal Register, present its position on whether it is practicable to adopt, without further supplementation [DOE's EIS]." 10 CFR 51.109(a)(1). Given NRC's expressed views on DOE's duty to supplement its EIS if that should be necessary, one would expect that staff's position will be that it is practicable to adopt DOE's EIS. Any other party to the proceeding who contends that it is not practicable to adopt DOE's EIS must then file a contention to that effect within 30 days after publication of the Notice of Hearing, together with affidavits setting forth the technical bases for the contention under the criteria established in 10 CFR 51.109(c). 10 CFR 51.109(a)(2). The presiding officer is then to resolve the dispute by using, to the extent possible, the criteria and procedures that are followed in ruling on motions to

reopen under 10 CFR 2.734.⁸ Id. To the extent that the presiding officer determines it to be practicable to adopt DOE's EIS, "such adoption shall be deemed to satisfy all responsibilities of the Commission under NEPA." 10 CFR 51.109(d).⁹ It appears that the intent of both the NWPA and the Commission in implementing the NWPA NEPA provisions is to provide for resolution of environmental issues in forums other than NRC's repository licensing proceeding.

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⁸The criteria used to determine a motion to reopen are specified in 10 CFR 2.734(a):

- (a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:
 - (1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
 - (2) The motion must address a significant safety or environmental issue.
 - (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

⁹To the extent that the presiding officer finds it is not practicable to adopt DOE's EIS, the presiding officer will determine whether the requirements of NEPA and NRC's regulations are met and then independently balance conflicting factors in the record and determine whether the construction authorization or license should be issued, denied or appropriately conditioned to protect environmental values. 10 CFR 51.109(e). The presiding officer's decision can be appealed to the Commission. 10 CFR 51.109(f).